87-1548

Supreme Court, U.S.
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NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

DANNIE RAY PREWITT,

PETITIONER

v.

COMMONWEALTH OF KENTUCKY

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

IS IT A DENIAL OF A CRIMINAL DEFENDANT'S FOURTH AND FOURTEENTH AMENDMENT RIGHTS TO BE SECURE AGAINST UNREASONABLE SEARCHES AND SEIZURES WHEN THE POLICE RELYING ON INFORMATION RECEIVED FROM AN INFORMANT AT APPROXIMATELY 1:00 p.m., THEREAFTER AT APPROXIMATELY 6:15 P.M., MAKE A WARRANTLESS SEARCH OF THE DEFENDANT'S AUTOMOBILE, AND WHERE THERE IS NO SHOWING OF EXIGENT CIRCUMSTANCES THAT PREVENTED THE POLICE FROM OBTAINING A WARRANT AFTER RECEIVING THE INFORMANT'S TIP.

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Petitioner, Dannie Ray Prewitt, respectfully prays that a Writ of Certiorari issue to review the opinion of the Kentucky Supreme court entered on November 5, 1987, as modified January 21, 1988, following a petition for rehearing.

OPINIONS BELOW

The opinion of the Supreme Court of Kentucky affirming the petitioner's conviction is unpublished. Danny Ray Prewitt v. Commonwealth of Kentucky, (File No. 87-SC-178-TR) (November 5, 1987, as modified January 21, 1988) (Appendix to Petition, hereafter A, 1 - 10)

JURISDICTION

The final opinion of the Kentucky Supreme Court was issued on January 21, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1257 (3).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution, provides:

> (Unreasonable searches and seizures.) The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Fourteenth Amendment to the United States Constitution, Section One, provides in pertinent part:

> . . .nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within it's jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On May 10, 1986, at approximately 6:15 p.m., the Northern Kentucky Narcotics Enforcement Unit conducted a warrantless search of Dannie Prewitt's automobile and discovered three plastic bags containing 100 Qualudes each. (TE 36). Based on the aforesaid evidence, a Kenton County Grand Jury returned an indictment against Prewitt charging him with possession of a counterfeit substance. (TR 5). Prewitt thereafter filed a motion to suppress the aforesaid evidence on the following grounds:

> . . .The exhibits are inadmissable due to the fact that the search was conducted in the absence of any exigent circumstances and lawful search warrant. The introduction of any exhibits concerning said search would violate the Defendant's rights as guaranteed by the Constitution of the United States and the Constitution of the Commonwealth of Kentucky. (TR 27).

On September 22, 1986, an evidentiary

hearing was held whereat the following facts were established in regards to the justification for the warrantless search.

First, the testimony established that the search of Appellant's vehicle was the direct result of a tip from an unidentified informant. According to Detective Michael Starnes, at around 1:00 p.m., on May 10, 1986, he had a phone conversation with an informant who advised him that a suspect, Jimmy Holt, had just arrived in town with ten thousand (10,000) qualudes, and Danny Ray Prewitt was going to pick up some qualudes that afternoon. (Transcript of September 22, 1986, suppression hearing, hereafter S.H. at 5).

Second, the testimony established that the police suspected that both Holt and Prewitt were involved in drug trafficking. Detective Starnes testified that the Holt family had a reputation for being heavily involved in drug

trafficking. (S.H. 6). In addition, Detective Spaw testified that Danny Prewitt was a suspected drug dealer, and that in March of 1986, a warrant had been obtained to search his residence for qualudes.[1] (S.H. 14). As a result thereof, Detective Spaw testified that he was "99.9% positive" that the informant's tip was accurate. (S.H. at 16).

Third, the testimony established that based on the informant's tip, the Northern Kentucky Narcotics Enforcement Unit began surveillance of both the Holt residence and the Prewitt residence (S.H. 8), and that the surveillance of the Holt residence which resulted in the stop of Prewitt's vehicle lasted from 2:00 p.m., until 5:57 p.m. (S.H. at 12).

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[1]Detective Spaw testified that in..."March of 1986, we executed a search warrant on him and his wife, and another subject and small baby were in the apartment at the time. We didn't find any qualudes." (S.H. 15).

Fourth, the testimony established that in the interim period from the receipt of the informant's tip at 1:00 p.m. to the stopping of Prewitt's automobile at 6:15 p.m., no attempt was made to contact a judicial person or magistrate. (S.H. at 8). Officer Sparnes, however, did communicate with the Assistant Commonwealth Attorney, Donald Richardson. (S.H. at 8). The records further reveal that on September 29, 1986, the trial court entered an order overruling Prewitt's motion to suppress. (TR 41-42).

Prewitt's case was brought on trial on October 7, 1986. The evidence for the Commonwealth during the first phase of the trial consisted of three witnesses, Officers Starnes and Spaw, and Thomas M. Burt, a forensic chemist for the Kentucky State Police. Both Starnes and Spaw again testified that Prewitt was stopped and searched as a result of a tip from an

unidentified informant. (TE 13, 14, 29). As a result of the aforesaid tip, Detective Starnes began a watch of the Holt residence, and Officer Spaw went to Covington to watch Prewitt's residence. At around 5:57 p.m., Starnes observed Prewitt stop at the Holt residence for about ten (10) minutes and then leave. (TE 18). Thereafter, at approximately 6:15 p.m., Prewitt was pulled over. (TE 21, 35). After detaining Prewitt, Officer Spaw searched Prewitt's car without his consent, and under Prewitt's car seat, Officer Spaw discovered a brown paper bag. (TE 36). Spaw subsequently opened the bag wherein he found three plastic bags containing 100 Qualudes each. (TE 36). Both Spaw and Starnes, furthermore, admitted that other than the tip, there was no indication of criminal activity on Prewitt's behalf (TE 21, 43-44). Thomas M. Bart, thereafter testified that the evidence seized from

Prewitt's car consisted of counterfeit qualudes. (TE 54-65). The only witnesses for Appellant, James Holt, thereafter testified that on May 10, 1986, he had a conversation with Prewitt between 5:00 and 6:00 p.m. and that he had given Prewitt permission to go to his house to air up his tire. (TE 72-74).

Following the close of the first phase of Prewitt's trial, the jury returned a verdict of guilty and fixed his punishment at five (5) years and a fine of $5,000.00. The Commonwealth thereafter presented evidence in support of the charge, that Prewitt was a persistent felon. (TE 79-85). The Jury again returned a verdict of guilty and enhanced Prewitt's prior sentence to twenty (20) years. (TR 64-67).

Final judgment was entered on November 4, 1986, sentencing Prewitt to twenty (20) years in prison (TR 64-69). On appeal to the Kentucky Supreme Court,

there were three (3) issues: 1) the trial court erred in it's refusal to suppress the evidence discovered during the warrantless search of Prewitt's automobile, where the police had amble time to obtain a warrant, and where the commonwealth was unable to prove that probable cause existed for the stop or that exigent circumstances existed which prevented their obtaining a warrant; 2) that the trial court erred by its refusal to order disclosure of the Commonwealth's informant, where the sole basis for the warrantless search of Prewitt's car was information provided by the alledged informant and consequently the identity of the informant and the contents of his statements were critical to a fair determination of the case; and 3) the trial court erred in its denial of a new trial where following the verdict a juror admitted that he knew the appellant, and had formed opinions as to sentencing and

punishment prior to submission of the case to the jury. In regards to the warrantless search of Movant's automobile, the Court originally stated as follows:

> Appellant next asserts that the trial court erred in failing to suppress the tablets as the fruit of an illegal search of his automobile. He contends that in the absence of probable cause and exigent circumstances, police were constitutionally required to obtain a search warrant before looking under the seat for the bag containing the tablets. We disagree. In Estep v. Commonwealth, Ky., 663 S.W. 2d 213 (1983), we held that where probable cause exists to stop a vehicle and to believe that contraband is contained therein, police may conduct a warrantless search of the vehicle and the contents thereof. There is no question that probable cause exists under circumstances where, acting on a specific tip from a previously reliable informant that appellant will pick up contraband from a named supplier, police observed appellant drive to the home of the alleged supplier and drive off a few minutes later. (A, 3-4).

The Court, however, did not address the

issue of exigent circumstances. In the modification to the Court's original opinion, however, the Court added the following paragraph.

> The officers received a tip at 1:00 p.m. that appellant would be going to the residence of Mr. Holt to pick up some controlled substance. The officers set up a surveillance at appellant's home and also at Holt's home. Nothing occurred until 5:30 p.m. when the officer watching appellant's home called the officer watching Holt's home to tell him that appellant was leaving his residence. Appellant's car approached Holt's house at approximately 6:00 p.m., and appellant went inside. He left at approximately 6:15 p.m. and was stopped. The officers did not have sufficient evidence to secure a search warrant until after the appellant had visited the Holt residence, which confirmed the accuracy of the tip. He left shortly thereafter, and there was not sufficient time to secure a warrant, and so an exigent circumstance existed. (A, 8-9).

Petitioner now seeks review by this Court.

REASON FOR GRANTING THE WRIT

THE OPINION BELOW REPRESENTS A FURTHER ABANDONMENT OF THE FOURTH (4TH) AMENDMENT RIGHT TO BE FREE FROM WARRANTLESS SEARCH AND SEIZURE IN ONES' AUTOMOBILE. THE PRESENT CASE PRESENTS AN APPROPRIATE VEHICLE FOR THE COURT TO ADDRESS AN IMPORTANT AND CONFUSING QUESTION OF LAW, AND ARREST THE FURTHER EROSION OF THE FOURTH (4TH) AMENDMENT BY THE LOCAL AUTHORITIES BASED ON A TOTAL DISREGARD OF ANY NEED FOR "EXIGENT CIRCUMSTANCES".

A. THE QUESTION PRESENTED IS NARROW AND PROPERLY BEFORE THE COURT IN AN APPROPRIATE CONTEXT.

This Court is asked to decide whether, as a matter of due process, a police officer should be allowed to search a vehicle without a warrant when it is practical to obtain one. This case is an appropriate vehicle to resolve this important constitutional question by deciding what "exigent circumstances" must exist to overcome the strong Fourth (4th) Amendment prohibition against warrantless searches. Review of the decision below would clarify the existing confusion between the application of the

line of cases which have permitted warrantless searches only in the face of "exigent circumstances", see Carroll v. United States, 267 U.S. 132 (1925); Coolidge v. New Hampshire, 403 U.S. 443 (1971), and the line of cases which have relaxed the exigency requirement. See Chambers v. Maroney, 399 U.S. 42 (1970); Texas v. White, 423 U.S. 67 (1975); United States v. Chadwick, 433 U.S. 1 (1977) and Unites States v. Ross, 456 U.S. 798 (1982).

The record in this case is an appropriate context in which to address this issue because the federal constitutional question was properly presented below and was directly addressed by the Kentucky Supreme Court.

Another reason why this case is an appropriate vehicle to decide this question is that the facts illustrate a situation where the authorities could have obtained a warrant but chose not to.

In this case, the informant's "tip" was received around 1:00 p.m. and surveillance was then set up. In addition, pursuant to the "tip", the investigating officers knew at 1:00 p.m., the type of car Petitioner would be driving and its intended involvement in the case. However, the Petitioner's car was not searched until 6:15 p.m. Consequently, it was reasonably practicable for the officers to obtain a warrant. As a result thereof, this case presents the Court with an opportunity to directly consider the situation where the officers never-the-less failed to do so.

B. THE QUESTION PRESENTED IS AN IMPORTANT ISSUE OF FEDERAL CONSTITUTIONAL LAW WHICH SHOULD BE DECIDED BY THIS COURT.

Although the needs of effective law enforcement justify exceptions to a literal adherance to the mandates of the fourth (4th) amendment, the need to protect our citizenry from unlawful

intrusion also remains the paramount concern. See Mincey v. Arizona, 437 U.S. 385 (1978). The importance of these rights was aptly described by Justice Steward in Coolidge v. New Hampshire, supra.

> In times of unrest, whether caused by crime or racial conflict, or fear of internal subversion, the basic law and the values it represents may appear unrealistic or "extravagant" to some. But the values were those of the authors of our fundamental constitutional concepts. In times not altogether unlike our own they won - by legal and constitutional means in England, and by revolution on this continent - a right of personal security against arbitrary intrusions by official power. If times have changed, reducing everyman's scope to do as he pleases in an urban and industrial world, the changes have made the values served by the Fourth Amendment more, not less, important. Id at 455.

The question now before the Court involves the important constitutional issue raised by the conflict between the

realistic needs of law enforcement for a flexible approach to the fourth (4th) amendment, and the public's need to be protected from the potential abuse of police power which resulted in the original enactment of the amendment. Specifically, the issue involves the search of automobiles and the need to prevent the destruction of evidence due to the vehicle's mobility, as opposed to the need to require adherence to the Constitutional mandates whenever possible.[2]

The importance of this issue is further evidenced by the recent decisions of this Court dealing with the fourth (4th) amendment. See United States v.

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[2] In Boyd v. United States, 116 U.S. 616, 633 (1886), the Court recognized its duty to enforce constitutional provisions protecting personal rights in a liberal manner, in order "to be watchful for the Constitutional rights of the citizen, and any stealthy encroachments thereon."

Ross, supra, Arizona v. Hicks, 108 S.Ct. 1149, 480 U.S. 94 L.Ed.2d 347 (1987), Illinois v. Gates, 462 U.S. 213 (1983) and Michigan v. Thomas, 458 U.S. 259 (1982). In spite of these decisions, however, a great deal of uncertainty remains as to the legality of a warrantless search of a motor vehicle, and the appropriate standards to be applied to these issues:

C. THE DECISION BELOW DEMONSTRATES THE KENTUCKY STATE COURTS INABILITY TO PROPERLY CONSIDER THE INDIVIDUALS FOURTH (4TH) AMENDMENT RIGHTS.

In the case at bar, the Kentucky Supreme Court failed to require compliance with the requirements of Carroll v. United States, supra; and Coolidge v. New Hampshire, supra, that a warrantless search must be based on both probable cause and exigent circumstances. In its initial decision, the Court first affirmed appellant's conviction without any finding of exigent circumstances at

all. Upon petition for rehearing, however, and although the Court did find exigent circumstances, it did so based on an analysis that probable cause was a continuing process which began its development at the time the informant telephoned at 1:00 p.m., and culminated when the Petitioner was seen visiting the Holt residence at 6:00 p.m. As a result, the Court concluded that in light of this continuing probable cause, "exigent circumstances" arose due to the fact that there was insufficient time to secure a warrant. (Opinion of Kentucky Supreme Court, as modified, TR 8-9). The Court belows reasoning, not withstanding, it is respectfully submitted that if probable cause existed, it existed at the time the informant's tip was first received. Assuming arguendo that probable cause existed at this point, there was no reason why a warrant could not have been obtained.

In Illinois v. Gates, supra, this Court adopted the "totality of the circumstances test" to be used in determining the sufficiency of the evidence necessary to support a finding of probable cause. Under the "totality of the circumstances test", if the informant's tip is reliable, and if the informant has been previously utilized, in that event there is sufficient justification to obtain a warrant based on probable cause. Applying Gates to the case at bar reveals that if the evidence was as the Commonwealth contends, the informant's tip would have provided the necessary probable cause to obtain a warrant to search Petitioner's automobile.[3] Consequently, and assuming

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[3]The factual basis of the informant's information and the reliability of the informant are still very important factors. Gates did not eliminate the two prong test of Aguillar v. Texas, 378 U.S. 108 (1964) and create a totally new standard of "totality of

probable cause was sufficient to obtain a warrant, in that event, it was sufficient to justify a warrantless search if exigent circumstances were also found.

Assuming arguendo that the information provided by the informant in

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the circumstances" but instead held that a deficiency in one prong may be compensated for by a strong showing of the other, thereby eliminating the rigidness of the former standard and giving more flexibility to the totality of the circumstances". Gates, supra. In the case at bar, and as set forth in the Brief for Appellee, filed in the Kentucky Supreme Court, the informant provided the investigating officer with the following facts:

(1) Names of specific individuals involved in the transaction, e.g., Dannie Ray Prewitt and Jimmy Holt. (SH 8/22/86, p.5).

(2) Named specific location where drug transactions would occur e.g., the Holt residence, Florence, Kentucky. (RSGG 8/8/86, p.2).

(3) A description of the vehicle appellant would be driving e.g., Lincoln Continental. (SH 9/22/86, p.4).

(4) The approximate time appellant would leave his house (TSF8/8/86, pp. 2-3).

(5) Specific information as to type of drug to be transacted, e.g., qualudes (SH 9/22/86, p.5 and RSF 8/8/86, p. 23).

(6) Name of individual who would supply

the case at bar was not sufficient to support a finding of probable cause, in that event, the search and seizure was constitutionally invalid. See Beck v. Ohio, 379 U.S. 89 (1963). On the other hand, assuming that the aforesaid information was sufficient to obtain a warrant, in that event, it was reasonably practicable for the officers to obtain a

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drugs, e.g., Timothy Holt plus the additional information that he'd just gotten back in town with 10,000 qualudes (SH 9/22/86, p.5).
"The facts in this appeal indicate that the officer who spoke with the informant knew who the informant was, and was well aware of his reliability because he had worked with this informant since joining the force some six (6) years before. Additionally, the evidence indicates the informant was reliable because information he had provided on three previous occasions had resulted in convictions. (TSF 8/8/86, p.2). Therefore, the officer could easily conclude that the tip was reliable and not merely being provided by someone trying to satisfy a grudge against the appellant". (Brief for Appellee at 9 and 10). See also opinion of Kentucky Supreme Court (A, 3-4).

warrant at 1:00 p.m. Consequently, and since Petitioner was not stopped and searched until over five (5) hours later, there were no exigent circumstances which prevented the officers from doing so. As a result thereof, the resultant search was invalid, and the evidence recovered as a result thereof should have been suppressed, Coolidge v. New Hampshire, supra.

D. THERE IS A NEED FOR A CLEARLY DEFINED STANDARD OF WHAT FINDING OF EXIGENCY IS REQUIRED AS A PREREQUISITE FOR WARRANTLESS VEHICLE SEARCHES.

Although automobiles did not exist when our Constitution was drafted, this Court has consistently held that the protections guaranteed by the Fourth (4th) Amendment are not lost due to the fact that an automobile is the object of

the search.[4] In Delaware v. Prouse, 440 U.S. 648 (1979), this Court stated:

> An individual operating or traveling in an automobile does not lose all reasonable expectation of privacy simply because the automobile and its use are subject to government regulation. Automobile travel is a basic, pervasive, and often necessary mode of transportation to and from one's home, workplace, and leisure activities. Many people spend more hours each day traveling in cars than walking on the streets. Undoubtedly, many find a greater sense of security and privacy in traveling in an

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[4] While automobiles have never been accorded the same deference as homes or offices, this Court has made it clear that "automobiles are 'effects' under the Fourth Amendment" and that the word 'automobile' is not a talesman in whose presence the Fourth Amendment fades away and disappears." Coolidge v. New Hampshire, supra, at 463-64. See also South Dakota v. Opperman, 428 U.S. 364, 367-368 (1976); Chambers v. Maroney, supra, United States v. Chadwick, supra; Cardwell v. Lewis, 417 U.S. 583, 589-591 (1974) (plurality opinion); and New York v. Class, 475 U.S. 106 (1986).

> automobile than they do in exposing themselves by pedestrian or other modes of travel. Were the individual subject to unfettered government intrusion every time he entered an automobile, the security guaranteed by the Fourth Amendment would be seriously circumscribed. Id, at 662.

In conflict with the individuals expectation of privacy in his automobile, however, is the public's need for law enforcement and the inherent difficulties caused by the mobility of automobiles. Consequently, in Carroll v. United States, supra, this Court recognized an exception to the warrant requirement in automobile searches, provided that there existed both probable cause and exigent circumstances which mandated the police action. Since the decision in Carroll, however, both state and federal courts have continued to grabble with appropriate definitions and applications of both probable cause and exigent

circumstances.[5]

In regards to the determination of probable cause, and as previously noted, this Court has moved from a rigid two-pronged test set forth in Aquillar v. Texas, 378 U.S. 108 (1964), to a

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[5]The recent decisions of both state and lower federal courts evaluating probable cause have varied widely depending on analysis of the specific facts in the case. Compare State v. Carter, 267 N.W. 2d 385 (Iowa, 1978); People v. Erwin, 369 N.E. 2d 1170 (New York, 1977); United States v. Munoz, 701 F. 2d 1293 (9th Cir. 1983); Terrell v. State, 429 So. 2d 778 (Fla. 1983); United States v. Johnson, 572 F. 2d 227 (9th Cir. 1978); Nickerson v. State, 645 S.W. 2d 288 (Tex. 1983); State v. Meadows, 260 N.W. 2d 328 (N.D. 1977); People v. Rodriques, 420 N.E. 2d 946 (New York, 1981). In addition, recent decisions of the court's indicate confusion as to what role exigent circumstances should play in the justification of a warrantless search. See State v. Landry, 459 So. 2d 428 (Fla. 1984), as compared to People v. Piper, 427 N.E. 2d 1361 (Ill. 1981); People v. White, 221 N.W. 2d 357 (Mich. 1974); Barnes v. State 406 So. 2d 84 (Fla. 1981), wherein the Courts held that no exigent circumstances were required in automobile searches.

practical common sense approach of examining all circumstances so as to determine the appropriateness of police action. See Illinois v. Gates, supra. The evolution of the exigent circumstances requirement, however, has not been as clear. In Carroll v. United States, supra, the Court originally adopted a common sense approach to defining exigent circumstances whereby warrantless searches based on probable cause would be permitted where it was impracticable for the police to obtain the warrant. Id at 156. Although this definition would appear on its fact to be clear and easily applied, the decisions since Carroll have indicated an apparent inability of the lower courts to adequately consider what is reasonably

practicable. Consequently, this Court has repeatedly attempted to resolve the resultant confusion.[6] With all due respect to the Court, however, it is respectfully submitted that the resultant evolution of an exigent circumstances test has resulted in the abandonment of a common sense practicable standard in favor of a rigid standard which although easy to apply, is contrary to the spirit and letter of the fourth (4th) amendment.

Applying decisions such as Texas v. White, supra, Michigan v. Thomas, supra, and Michigan v. Thomas, supra, trial courts could conclude that the test for determining whether or not exigent circumstances exist into an analysis

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[6]See Chimmel v. California, 395 U.S. 752 (1969); Chambers v. Maroney, supra; Texas v. White, supra; Cardwell v. Lewis, 417 U.S. 583 (1974); United States v. Chadwick, supra; United States v. Ross, supra; Michigan v. Thomas, supra; and New York v. Belton, 453 U.S. 454 (1981).

of: was the search the search of a "movable vessel"? If the answer is affirmative, exigent circumstances are presumed. Assuming arguendo, however, that exigent circumstances are still an important prerequisite to a warrantless search,[7] and it is respectfully submitted that they should be, this one prong test though easy to apply, is inconsistent with protections afforded to the individual by the Fourth (4th) Amendment.

Furthermore, the decision of this Court in New York v. Class, 475 U.S. 106 (1986), suggests that the Court is

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[7] The decision of Michigan v. Thomas, supra suggests that exigent circumstances are no longer a prerequisite to a valid warrantless search of an automobile. The recent readoption of Coolidge v. New Hampshire, supra, in Arizona v. Hicks, supra suggests that such a finding is still necessary. In addition, as hereinafter discussed, the decision of New York v. Class, supra, suggests a return to the common sense analysis of Carroll v. United States, supra.

now abandoning the automatic approval of warrantless searches of automobiles when there is probable cause, and returning to a test whereby the individuals expectation of privacy is weighed against the importance "of the governmental interests alledged to justify the intrusion" New York v. Class, Id, citing United States v. Place, 462 U.S. 696, 703 (1983). In reality, such a test represents a return to a realistic consideration of the exigent circumstances in the case, as was required in Carroll v. United States, supra. Pursuant to this analysis, both the individual's expectations and the government's needs are given consideration, with the strongest of the two determining the outcome. Consequently, when there is a practicable reason why a warrant could not be reasonably secured, in that event, the search is valid. However, if there was

no reason, it must be set aside and any evidence obtained suppressed. This approach is consistent with the recent approval taken by the court in Illinois v. Gates, supra, and is also consistent with the protections guaranteed the individual via the Fourth (4th) Amendment. In application it would not only provide protection for individual rights, it would also "provide the police with a standard that can be easily interpreted and flexibly applied to constantly changing situations."[8] In order to consider this possibility, and due to the confusion surrounding the automobile exception, this Court is asked to grant full review of this issue.

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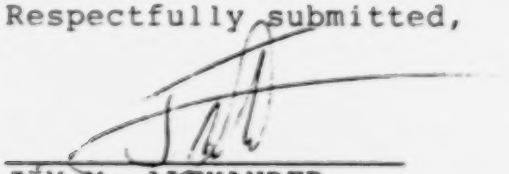
[8]Hjelmaas, The Need for a Higher Standard of Exigency as a Prerequisite for Warrantless Vehicle Searches, 71 Iowa Law Review 1161, 1185-1186 (1986).

CONCLUSION

The present case presents the important, yet still unclear constitutional issue of whether or not and to what extent exigent circumstances are still required to justify the warrantless search of an automobile. For the reasons stated above, a writ of certiorari should issue to review the opinion of the Kentucky Supreme Court.

Respectfully submitted,



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(606) 233-1476

COUNSEL FOR PETITIONER

NO.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

DANNIE RAY PREWITT,

PETITIONER

v.

COMMONWEALTH OF KENTUCKY

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

APPENDIX TO
PETITION FOR WRIT OF CERTIORARI

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RENDERED: NOVEMBER 5, 1987
(NOT TO BE PUBLISHED)

SUPREME COURT OF KENTUCKY

87-SC-178 - TRG
(86-CA-2690-MR)

DANNIE RAY PREWITT APPELLANT

V.

KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
#86-CR-145

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant was convicted in Kenton Circuit Court of possession of a counterfeit substance and of being a first-degree persistent felony offender. He was sentenced to a term of twenty years and ordered to pay a $5,000 fine.

The conviction for possession of a counterfeit substance was based on discovery of a large quantity of tablets

in appellant's automobile, which had been stopped by police acting on a tip from a confidential informant.

Appellant raises three alleged errors on appeal. First, appellant contends that the trial court erred in failing to require disclosure of the identity of the confidential informant. This issue was not properly preserved for appellate review since appellant failed to directly request the trial court to order such disclosure either before or during the trial, or to even question officers at trial on the subject. However, even if appellant's references to the reliability of the undisclosed informant were sufficient to preserve this issue, disclosure would not be required under the circumstances of this case, as the informant was neither a participant in the crime nor relevant to the preparation of appellant's defense. Schooley v. Commonwealth, Ky., 627 S.W.2d

576 (1982).

Appellant next asserts that the trial court erred in failing to suppress the tablets as the fruit of an illegal search of his automobile. He contends that in the absence of probable cause and exigent circumstances police were constitutionally required to obtain a search warrant before looking under the seat for the bag containing the tablets. We disagree. In Estep v. Commonwealth, Ky., 663 S.W.2d 213 (1983), we held that where probable cause exists to stop a vehicle and to believe that contraband is contained therein, police may conduct a warrantless search of the vehicle and the contents thereof. There is no question that probable cause exists under circumstances where, acting on a specific tip from a previously reliable informant that appellant will pick up contraband from a named supplier, police observed appellant drive to the home of the

alleged supplier and drive off a few minutes later.

Finally, appellant argues that the trial court erred in denying him a new trial based on testimony from his fiancee that she overheared a juror say after the trial that appellant should be put in isolation with the key thrown away and that the juror thought he "knew that name from somewhere." This testimony concerning a casual remark is insufficient evidence of juror bias to support a finding that the defendant was denied a fair trial. RCr 10.02; Combs v. Commonwealth, KY. App., 356 S.W.2d 761 (1962).

The judgment of the Kenton Circuit court is affirmed.

All concur.

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SUPREME COURT OF KENTUCKY

87-SC-178 - TRG
(86-CA-2690-MR)

DANNIE RAY PREWITT APPELLANT

V.

KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
#86-CR-145

COMMONWEALTH OF KENTUCKY APPELLEE

ORDER DENYING PETITION FOR REHEARING AND MODIFYING OPINION

Appellant's petition for rehearing of this court's opinion rendered November 5, 1987, is denied. The opinion is modified on its face by substituting the attached pages 1, 3, and 4 for pages 1 and 3 in the original opinion.

All concur.

ENTERED: January 21, 1988

Chief Justice

RENDERED: NOVEMBER 5, 1987
(NOT TO BE PUBLISHED)
AS MODIFIED: JANUARY 21, 1988

SUPREME COURT OF KENTUCKY

87-SC-178 - TRG
(86-CA-2690-MR)

DANNIE RAY PREWITT APPELLANT

V.

KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
#86-CR-145

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant was convicted in Kenton Circuit Court of possession of a counterfeit substance and of being a first-degree persistent felony offender. He was sentenced to a term of twenty years and ordered to pay a $5,000 fine.

The conviction for possession of a counterfeit therein, police may conduct a warrantless search of the

vehicle and the contents thereof. There is no question that probable cause exists under circumstances where, acting on a specific tip from a previously reliable informant that appellant will pick up contraband from a named supplier, police observed appellant drive to the home of the alleged supplier and drive off a few minutes later.

The officers received a tip at 1:00 p.m. that appellant would be going to the residence of Mr. Holt to pick up some controlled substance. The officer set up a surveillance at appellant's home and also at Holt's home. Nothing occurred until 5:30 p.m. when the officer watching appellant's home called the officer watching Holt's home to tell him that appellant was leaving his residence. Appellant's car approached Holt's house at approximately 6:00 p.m., and was stopped. The officers did not have sufficient evidence to secure a search

warrant until after the appellant had visited the Holt residence, which confirmed the accuracy of the tip. He left shortly thereafter, and there was not sufficient time to secure a warrant, and so an exigent circumstance existed.

Finally, appellant argues that the trial court erred in denying him a new trial based on testimony from his fiancee that she overheard a juror say after the trial that appellant should be put in isolation with the key thrown away and that the juror thought he "knew that name from somewhere." This testimony concerning a casual remark is insufficient evidence of juror bias to support a finding that the defendant was denied a fair trial. RCr 10.02; Combs v. Commonwealth, Ky. App., 356 S.W.2d 761 (1962).

The judgment of the Kenton Circuit Court is affirmed.

All concur.

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COMMONWEALTH OF KENTUCKY
SIXTEENTH JUDICIAL CIRCUIT
KENTON CIRCUIT COURT
SECOND DIVISION

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS.

ORDER

DANNY RAY PREWITT DEFENDANT

* *

This matter is before the Court pursuant to Defendant's motion to suppress evidence seized from Defendant on May 10, 1986. The Court received evidence relative to these issues on August 8, 1986, by way of a recitation of stipulated facts. Thereafter, additional evidence was submitted regarding these issues on September 22, 1986. At the conclusion of the hearing, on September 22, 1986, the Court entered its verbal findings and conclusions. Those findings and conclusions, not inconsistent

herewith, are incorporated herein by reference.

Based upon the Court's findings and conclusions, previously entered herein, and the entire case in this matter, the Court enters the following Order.

IT IS HEREBY ORDERED AND ADJUDGED that the motion of the Defendant, Danny Ray Prewitt, to suppress the evidence seized on May 10, 1986, is OVERRULED.

SO ORDERED this the 29th day of September, 1986.

_____

DOUGLAS M. STEPHENS, JUDGE
KENTON CIRCUIT COURT
SECOND DIVISION

Copies to:

Hon. Donald L. Richardson
Hon. Robert N. Trainor

COMMONWEALTH OF KENTUCKY
SIXTEENTH JUDICIAL CIRCUIT
KENTON CIRCUIT COURT
SECOND DIVISION

COMMONWEALTH OF KENTUCKY PLAINTIFF

VS. NO. 86-CR-145

FINAL JUDGMENT AND
SENTENCE OF IMPRISONMENT

DANNY RAY PREWITT DEFENDANT
AKA DANNIE PREWITT

* *

The Defendant entered a plea of not guilty at arraignment on June 30, 1986. This matter was thereafter set for trial, before a jury, on October 7, 1986. A trial was conducted on that date and the jury returned a verdict that the Defendant was guilty of Possession of a Counterfeit Substance, Count I, and fixed his punishment at five (5) years in the State Penitentiary and a fine of $5,000.00. The jury thereafter returned a verdict that the Defendant was guilty of being a Persistent Felony Offender in

the First Degree, Count II, and fixed his punishment at twenty (20) years in the State Penitentiary.

On November 3, 1986, the Defendant appeared in Open Court with counsel, Hon. Robert N. Trainor; and the Commonwealth was represented by its assistant attorney, Hon. Gregory L. Weber. The Division of probation and Parole submitted a Pre-Sentence Investigation and Report which was reviewed by the Defendant and counsel; a suggestion to that report was made by the Defendant and counsel. The Court inquired of the Defendant and counsel whether they had any legal cause why judgment should not be pronouced and afforded the Defendant and counsel an opportunity to make statements on behalf of the Defendant. Having given due consideration to the Pre-Sentence Investigative Report, the nature and circumstances of the crime, the history,

character and condition of the Defendant and the statutory mandates with respect to sentencing herein, the Court is of the opinion that imprisonment is necessary for the protection of the public because the Defendant is in need of correctional treatment that can be provided most effectively by the Defendant's commitment to a correctional institute, there is substantial risk that during a period of probation or conditional discharge the Defendant will commit another crime, probation or conditional discharge would unduly depreciate the seriousness of the Defendant's crime (KRS 355.010) and the Defendant is not eligible for probation or conditional discharge by virtue of KRS 533.060.

No reason having been shown why judgment should not be pronounced, sentence was imposed by the Court upon the Defendant, and IT IS, THEREFORE, ORDERED AND ADJUDGED by the Court that

the Defendant is guilty of the crime of Possession of a Counterfeit Substance, Count I, ~~and~~ he shall be confined in the State Penitentiary for a term of five (5) years and pay a find in the amount of $5,000.00. IT IS FURTHER ORDERED AND ADJUDGED by the Court that the Defendant is guilty of the crime of being a Persistent Felony Offender in the First Degree, Count II, and in lieu of the sentence imposed above, he shall be confined in the State Penitentiary for a term of twenty (20) years and pay a fine of $5,000.00.

The Defendant is credited with thirty-three (33) days served in jail as of November 3, 1986.

IT IS FINALLY ORDERED AND ADJUDGED that the Kenton County Sheriff shall deliver the Defendant to the custody of the Department of Corrections hereunder at such location within this State as the Department shall designate.

After imposing sentence, the Court informed the Defendant that he had a right to appeal to the Court of Appeals of Kentucky with the assistance of counsel, that if he were financially unable to afford an appeal, a record would be prepared for him at public expense and counsel would be appointed to represent him, that an appeal must be taken within ten (10) days of the date of this Judgment and that the Clerk of the Court would prepare and file a notice of appeal in his behalf within that time if he so requests. Pending appeal, if any, the Defendant is committed to custody.

SO ORDERED this the 4th day of November, 1986.

_____
DOUGLAS M. STEPHENS, JUDGE
KENTON CIRCUIT COURT
SECOND DIVISION

Copies to:

Hon. Gregory L. Weber
Hon. Robert N. Trainor
Division of Probation and Parole
Kenton County Sheriff (2)
Kenton County Jail
Pre-Trial Services
Institution

JOSEPH F. SPANIOL, JR.
CLERK
Supreme Court, U.S.
FILED
MAY 11 1988
JOSEPH F. SPANIOL, JR.
CLERK

NO. 87-1548

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

DANNIE RAY PREWITT,

Petitioner

versus

COMMONWEALTH OF KENTUCKY,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

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QUESTION PRESENTED

WHETHER A CRIMINAL DEFENDANT'S FOURTH AMENDMENT RIGHT TO BE FREE FROM UNREASONABLE SEARCHES AND SEIZURES IS VIOLATED WHEN THE POLICE, ACTING ON A TIP FROM A RELIABLE INFORMANT, STOP THE DEFENDANT'S AUTOMOBILE ON THE REASONABLE BELIEF THAT DRUGS ARE CONTAINED THEREIN AND CONDUCTS A WARRANTLESS SEARCH?

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NO. 87-1548

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

DANNIE RAY PREWITT,

Petitioner

versus

COMMONWEALTH OF KENTUCKY,

Respondent

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF KENTUCKY

Respondent, the Commonwealth of Kentucky, respectfully urges the Court to deny certiorari for the following reasons.

OPINION BELOW

The unreported opinions of the Supreme Court of Kentucky are reproduced herein as an appendix.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

CONSTITUTIONAL PROVISION INVOLVED

The Constitutional provision involved is the Fourth Amendment to the United States Constitution.

COUNTERSTATEMENT OF THE CASE

The material facts in this case are as follows:

On May 10, 1986, at approximately 1:00 p.m., Officer Michael Starnes of the Northern Kentucky Drug Enforcement Unit received a call from a confidential informant. The informant stated that petitioner would be going to the residence of Jimmy Holt in Florence, Kentucky, to pick up some Quaaludes. The informant told Officer Starnes that Holt had just gotten back in town with 10,000 Quaaludes and that petitioner was on his way out or going out sometime that afternoon to pick some up (Transcript of Suppression Hearing on September 22, 1986, p. 15,

hereafter SH). The informant further identified the make and model of the automobile petitioner would be driving as a Lincoln Continental (Transcript of Recitation of Stipulation Facts August 8, 1986, p. 2, hereafter TSF).

Officer Starnes had worked with this informant during the entire six years he had been on the force (TSF 8/8/86, p. 2). Officer Starnes believed the informant to be reliable (SH 1/22/86, p. 5). The informant had provided reliable information in the past which had led to the arrest and conviction of individuals involved in drug trafficking (TSF 8/8/86, p. 2).

After getting the information from the informant, Officer Starnes called his supervisor, Officer Hal Spaw, Director of the Northern Kentucky Drug Enforcement Unit (TSF 8/8/86, p. 2 and Transcript of Evidence 10/7/86, p. 14, 28, hereafter TE). Officer Spaw then went to the address where petitioner was living to set up surveillance and to determine if petitioner would in fact be leaving as the informant had stated (TSF 8/8/86, p. 3). Approximately three hours

later, petitioner came out of his house and left in his automobile. Officer Spaw recognized the petitioner and his car (TE 10/7/86, p. 30).

Petitioner was followed to the Holt residence in Florence, Kentucky. At this point police were able to again confirm the information given them by the informant. Petitioner spent at least 10 minutes, but no more than 20 minutes, in the Holt residence (TE 10/7/86, p. 16, 33). Petitioner then returned to his car and left (TSF 8/8/86, p. 3). Petitioner was stopped by a marked cruiser and officers conducted a pat-down search believing petitioner to be armed with a gun (TSF 8/8/86, p. 4 and TE 10/7/86, p. 22). While Officer Starnes was questioning petitioner outside his vehicle, Officer Spaw opened the passenger door and saw a brown paper bag sticking from under the front passenger seat (TE 10/7/86, p. 46-47). Officer Spaw removed the bag and upon opening it discovered three plastic baggies containing 100 Quaaludes each (TE 10/7/86, pp. 19, 35, 48). Later examination by a laboratory chemist revealed the pill quantity to be 300; 200 of which

contained methaqualone and 100 contained diazepam (TSF 8/8/86, p. 4 and TE 10/7/86, p. 59).

On June 27, 1986, a Kenton County, Kentucky, Grand Jury returned an indictment charging petitioner with possession of a counterfeit substance (300 counterfeit Quaaludes) and as a persistent felony offender in the first degree (Transcript of Record, hereafter TR 5).

Prior to trial, petitioner moved to suppress the evidence taken from his vehicle on May 10, 1986. The evidence consisted of 300 tablets (Quaaludes) found in a brown paper bag in the passenger compartment of petitioner's automobile. In support of the suppression motion, petitioner alleged the search was conducted without a search warrant or any exigent circumstances (TR 15). The trial court overruled petitioner's motion to suppress the evidence (TR 40-41).

Petitioner's trial by jury was held on October 7, 1986. Petitioner was found guilty of Possession of a Counterfeit Substance. He was sentenced to five (5) years in the state

penitentiary and a fine of $5,000.00. The petitioner was also found guilty of being a persistent felony offender in the first degree. For this conviction, he was sentenced to twenty (20) years in the state penitentiary and a fine of $5,000.00 (TR 64-67).

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

I.

THE WARRANTLESS SEARCH OF PETITIONER'S AUTOMOBILE DID NOT VIOLATE THE FOURTH AMENDMENT AND COMPLIED WITH THE "BRIGHT LINE" PRINCIPLES ANNOUNCED IN UNITED STATES V. ROSS, 456 U.S. 798 (1982).

United States v. Ross, 456 U.S. 798 (1982) is dispositive of the issue because it clearly sets forth the standard for warrantless searches of motor vehicles based on probable cause under the "automobile exception." In Ross, this Court held that police who have probable cause to believe an automobile contains contraband may conduct a warrantless search of the entire vehicle, including all compartments and containers found therein. 456 U.S. at 823. Ross extends the holding in Carroll v. United States, 267 U.S. 132

(1925)[1] by defining the scope of the search under the automobile exception. The holding in Ross has been reaffirmed in California v. Carney, 471 U.S. 386 (1985). Carney upheld the warrantless search of a mobile home because police had probable cause to believe the defendant was distributing a controlled substance from the vehicle. 471 U.S. at 390-95. See also United States v. Johns, 469 U.S. 478 (1985). (upholding warrantless search of packages three days after removal from a truck because police had probable cause to believe the truck contained contraband).

A.

Based on the totality of the circumstances in this case, a search warrant for petitioner's automobile could not have been issued before the informant's tip had been corroborated.

The facts in the present case indicate that the confidential informant disclosed the following information to the investigative officer:

---

[1]Carroll held that under the Fourth Amendment a warrant was not needed to search an automobile stopped by police who had probable cause to believe the automobile contained contraband. 267 U.S. at 153.

(1) Names of specific individuals involved in the transaction, e.g. Dannie Ray Prewitt and Jimmy Holt (SH 8/22/86, p. 5).

(2) Named specific location where drug transaction would occur, e.g., the Holt residence, Florence, Kentucky (TSF 8/8/86, p. 2).

(3) A description of the vehicle petitioner would be driving, e.g., Lincoln Continental (SH 9/22/86, p. 4).

(4) The approximate time petitioner would leave his house (TSF 8/8/86, p. 2-3).

(5) Specific information as to type of drug to be transacted, e.g., quaaludes (SH 9/22/86, p. 5 and TSF 8/8/86, p. 23).

(6) Name of individual who would supply drugs, e.g. Timothy Holt plus the additional information that he'd just gotten back in town with 10,000 quaaludes (SH 9/22/86, p. 5).

Given these specifics, petitioner contends that probable cause existed for the issuance of a search warrant of his automobile when the tip was first received. See the petition at pp. 16-17.

"The task of the issuing magistrate is simply to make a practical, common-sense decision whether, given all the circumstances set forth in the affidavit before him, including the 'veracity'

and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." Illinois v. Gates, 462 U.S. 213, 238 (1983). Moreover, the standard for review of an issuing magistrate's probable cause determination is whether there existed a "substantial basis" for concluding that a search would uncover evidence of wrong doing. 462 U.S. at 236. In view of the "substantial basis" requirement, a magistrate could not have concluded that petitioner's automobile contained drugs when petitioner had not yet visited the Holt residence and engaged in the anticipated drug transaction. In short, petitioner's ten (10) to twenty (20) minute stay at the Holt residence and subsequent exit in his automobile gave rise to the type of "probabilities" upon which a magistrate would issue a search warrant. The probable cause determination must be based on objective facts and not merely on the subjective good faith of the police officers. See Ross, 456 U.S. at 808. Thus the issuance of a search warrant is unnecessary

when the police have verified every facet of the information given to them by the confidential informant. After corroborating the tip, police would have reason to believe the remaining unverified bit of information -- that the accused has drugs in his automobile -- is likewise true. See 462 U.S. at 243. The corroboration of petitioner's conduct (going and leaving the Holt residence), "reduced the chances of a reckless or prevaricating tale." See 462 U.S. at 244-245. The corroboration of the tip provided the necessary probabilities for the warrantless search of petitioner's automobile. See 462 U.S. at 246.

B.

A warrant was not required to search petitioner's automobile after it had been legitimately stopped and there was reason to believe contraband was contained therein.

In Ross, like the case at bar, police had received information from a reliable informant. The informant gave the police a description of the defendant and his car, told them that at a specific location the defendant had completed a drug sale and that he had narcotics in the trunk

of his car. The police drove to the location and stopped the car when they realized the driver matched the informant's description. After the defendant was arrested, police opened the trunk and found a closed paper bag. Upon opening the bag they discovered glassine bags containing heroin. A more thorough search of the car was later completed at the police station where police discovered a red leather pouch containing $3,200 in cash. No warrant had been obtained for the search of the automobile. 267 U.S. at 800-801.

This Court opined that Congress had always recognized the impracticability of having to get a warrant in cases involving transportation of contraband. In a footnote this Court stated:

> individuals always have been on notice that movable vessels may be stopped and searched on facts giving rise to probable cause that the vehicle contains contraband, without the protection afforded by a magistrate's prior evaluation of those facts.

456 U.S. at 806, n.8.

The exception to the warrant requirement established in Carroll only applies to searches of

vehicles supported by probable cause. 456 U.S. at 809. Thus, a search is reasonable if it is based on facts that would justify the issuance of a warrant even though one had not been obtained. There was no real difference between holding a car while presenting the probable cause issue to a magistrate to obtain a warrant and carrying out an immediate search without a warrant, provided there was probable cause. 456 U.S. at 809.

Once police have probable cause to search an automobile they may "conduct a search of the vehicle that is as thorough as a magistrate could authorize in a warrant particularly describing the place to be searched." 456 U.S. at 800.

Additionally, this Court opined that the scope of the search under the automobile exception is not defined by the container but is "defined by the object of the search and the places in which there is probable cause to believe it may be found." 456 U.S. at 824. The Ross Court distinguishes United States v. Chadwick, 433 U.S. 1 (1977) and Arkansas v. Sanders, 442 U.S. 753 (1979) by explaining that in those cases the

police only had probable cause to believe that specific containers concealed contraband. 456 U.S. at 810-14. In the present case, as in Ross, probable cause applies to the entire automobile. The police had probable cause to believe that contraband was contained somewhere in petitioner's automobile.

As the Court concluded in Ross, when police have legitimately stopped a vehicle and have probable cause to believe contraband is concealed within the vehicle, they may conduct a warrantless search. 456 U.S. at 800. The search may be of every part of the vehicle including containers within the vehicle that may conceal the object of the search. 456 U.S. at 818. Without doubt, the case at bar falls within the holding of Ross, and thus the petition for writ of certiorari should be denied.

C.

The status of exigent circumstances with respect to a warrantless search of an automobile where the police have probable cause to believe contraband is contained therein.

Exigent circumstances are not a necessary predicate for a warrantless search of an automobile where police have probable cause to believe that contraband is contained therein.

In the present case, the Supreme Court of Kentucky issued two written unpublished opinions (Appendix herein, A1-8). In the original opinion the Kentucky court upheld the warrantless search of petitioner's automobile solely on the basis that the police had probable cause to conduct the search (A3). Furthermore, the Court rejected petitioner's argument that "in the absence of probable cause and exigent circumstances police were required to obtain a search warrant. . . ." (A2-3). [Emphasis added]. The Court's holding was based on Estep v. Commonwealth, Ky., 663 S.W.2d 213 (1983) (A3). In Estep, Kentucky adopted the holding of Ross, supra. Consequently, the Estep court applied the "bright line" principles of Ross and found "[n]o violation of Section 10 of the Kentucky Constitution or of Amendment IV of the United States Constitution." 663 S.W.2d at 215-216.

Approximately two and one-half months after the original opinion had been issued, the Supreme

Court of Kentucky issued a modified opinion (A5-8). In this opinion, the Court once again and held that probable cause existed for the warrantless search (A5-6). However, the Court further concluded, ". . . there was not sufficient time to secure a warrant, and so an exigent circumstance existed." (A6-7).

It is apparent from the modified opinion that the Kentucky court's analysis considered the impact of "probable cause" and "exigent circumstances" upon the warrantless search of petitioner's automobile. Moreover, it appears that the Court's modified holding impliedly relies upon Estep, which was based partly upon whether the warrantless search violated Section 10 of the Kentucky Constitution. Because Estep is rooted in part on an interpretation of a State constitution, the respondent submits that the Kentucky Supreme Court could apply a stricter standard for a warrantless search than announced in Ross.

In Johns, supra, this Court has held that "A vehicle lawfully in police custody may be

searched on the basis of probable cause to believe that it contains contraband, and there is no requirement of exigent circumstances to justify such a warrantless search." 469 U.S. at 484; See also Florida v. Meyers, 466 U.S. 380 (1984) (per curiam). There have been diverse opinions among the Federal Circuit Courts with respect to whether an exigent circumstance analysis should be engaged.[2]

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[2](PROBABLE CAUSE ANALYSIS ONLY:) United States v. Moscatiello, 771 F.2d 589 (1st Cir. 1985); United States v. Roy, 734 F.2d 108 (2nd Cir. 1984) cert. denied 106 S.Ct. 1520 (1986); United States v. Schecter, 717 F.2d 864 (3rd Cir. 1983); United States v. $29,000-U.S. Currency, 745 F.2d 853 (4th Cir. 1984); United States v. Mendoza, 722 F.2d 96 (5th Cir. 1983); United States v.Burnett, 791 F.2d 64 (6th Cir. 1986); U.S. v. Tate, 821 F.2d 1328 (8th Cir. 1987); United States v. Corral-Villavicencio, 753 F.2d 785 (9th Cir. 1985); United States v. Esle, 743 F.2d 1465 (11th Cir. 1984).

(PROBABLE CAUSE AND EXIGENT CIRCUMSTANCE ANALYSIS ONLY:) United States v. Reyes, 792 F.2d 536 (5th Cir.) cert. denied 107 S.Ct. 191 (1986); United States v. Hepperle, 810 F.2d 836 (8th Cir.) cert. denied 107 S.Ct. 3274 (1987); United States v. Bain, 736 F.2d 1480 (11th Cir.) cert. denied 469 U.S. 937 (1984); See also United States v. Williams, 822 F.2d 1174 (D.C. Cir. 1987) (distinguishes between whether police had probable cause to believe the contraband was in a specific container or just somewhere in the auto but did not know where).

Even though some of these circuits interpret Ross differently, they apply the same type of fundamental Fourth Amendment analysis found in Ross.

CONCLUSION

Respondent respectfully requests that the petition for writ of certiorari be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

As a member of the Bar of the United States Supreme Court, the undersigned hereby certifies that on the 11th day of May, 1988, three copies of the foregoing Response to Petition for Writ of Certiorari were mailed first class, postage prepaid, to Honorable Jim M. Alexander, Security Trust Building, 312, Lexington, Kentucky 40507, Counsel for Petitioner.

Rickie L. Pearson
Assistant Attorney General

NO. 87-1548

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

DANNIE RAY PREWITT,

PETITIONER

v.

COMMONWEALTH OF KENTUCKY,

RESPONDENT

ON PETITION FOR A WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

APPENDIX TO
RESPONSE FOR WRIT OF CERTIORARI

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RENDERED: NOVEMBER 5, 1987
(NOT TO BE PUBLISHED)

SUPREME COURT OF KENTUCKY

87-SC-178-TRG
(86-CA-2690-MR)

DANNIE RAY PREWITT APPELLANT

V.

KENTON CIRCUIT COURT
HONORABLE DOUGLAS M. STEPHENS, JUDGE
#86-CR-145

COMMONWEALTH OF KENTUCKY APPELLEE

MEMORANDUM OPINION OF THE COURT

AFFIRMING

Appellant was convicted in Kenton Circuit Court of possession of a counterfeit substance and of being a first-degree persistent felony offender. He was sentenced to a term of twenty years and ordered to pay a $5,000 fine.

The conviction for possession of a counterfeit substance was based on discovery of a large quantity of tablets in appellant's automobile, which had been stopped by police acting on a tip from a confidential informant.

Appellant raises three alleged errors on appeal. First, appellant contends that the trial court erred in failing to require disclosure of the identity of the confidential informant. This issue was not properly preserved for appellate review since appellant failed to directly request the trial court to order such disclosure either before or during the trial, or to even question officers at trial on the subject. However, even if appellant's references to the reliability of the undisclosed informant were sufficient to preserve this issue, disclosure would not be required under the circumstances of this case, as the informant was neither a participant in the crime nor relevant to the preparation of appellant's defense. Schooley v. Commonwealth, Ky., 627 S.W.2d 576 (1982).

Appellant next asserts that the trial court erred in failing to suppress the tablets as the fruit of an illegal search of his automobile. He contends that in the absence of probable cause and exigent circumstances police were constitutionally required to obtain a search

warrant before looking under the seat for the bag containing the tablets. We disagree. In Estep v. Commonwealth, Ky., 663 S.W.2d 213 (1983), we held that where probable cause exists to stop a vehicle and to believe that contraband is contained therein, police may conduct a warrantless search of the vehicle and the contents thereof. There is no question that probable cause exists under circumstances where, acting on a specific tip from a previously reliable informant that appellant will pick up contraband from a named supplier, police observed appellant drive to the home of the alleged supplier and drive off a few minutes later.

Finally, appellant argues that the trial court erred in denying him a new trial based on testimony from his fiancee that she overheard a juror say after the trial that appellant should be put in isolation with the key thrown away and that the juror thought he "knew that name from somewhere." This testimony concerning a casual remark is insufficient evidence of juror bias to support a finding that the defendant was denied a

fair trial. RCr 10.02; Combs v. Commonwealth, Ky. App., 356 S.W.2d 761 (1962).

The judgment of the Kenton Circuit court is affirmed.

All concur.

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SUPREME COURT OF KENTUCKY

87-SC-178-TRG
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HONORABLE DOUGLAS M. STEPHENS, JUDGE
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AFFIRMING

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The conviction for possession of a counterfeit therein, police may conduct a warrantless search of the vehicle and the contents thereof. There is no question that probable cause

exists under circumstances where, acting on a specific tip from a previously reliable informant that appellant will pick up contraband from a named supplier, police observed appellant drive to the home of the alleged supplier and drive off a few minutes later.

The officers received a tip at 1:00 p.m. that appellant would be going to the residence of Mr. Holt to pick up some controlled substance. The officer set up a surveillance at appellant's home and also at Holt's home. Nothing occurred until 5:30 p.m. when the officer watching appellant's home called the officer watching Holt's home to tell him that appellant was leaving his residence. Appellant's car approached Holt's house at approximately 6:00 p.m., and appellant went inside. He left at approximately 6:15 p.m., and was stopped. The officers did not have sufficient evidence to secure a search warrant until after the appellant had visited the Holt residence, which confirmed the accuracy of the tip. He left shortly thereafter, and there was

not sufficient time to secure a warrant, and so an exigent circumstance existed.

Finally, appellant argues that the trial court erred in denying him a new trial based on testimony from his fiancee that she overheard a juror say after the trial that appellant should be put in isolation with the key thrown away and that the juror thought he "knew that name from somewhere." This testimony concerning a casual remark is insufficient evidence of juror bias to support a finding that the defendant was denied a fair trial. RCr 10.01; Combs v. Commonwealth, Ky. App., 356 S.W.2d 761 (1962).

The judgment of the Kenton Circuit Court is affirmed.

All concur.

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